BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DARREN W. WALTON Claimant	)	
VS.	)	
WRIGHT TREE SERVICE, INC. Respondent	)	Docket Nos. 1,052,428 and 1,052,429
AND	)	
AMERICAN CASUALTY CO. OF READING, PA. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent requested review of the May 11, 2011, preliminary hearing Order entered by Administrative Law Judge Brad E. Avery. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Brandon A. Lawson, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that the parties are covered by the Kansas Workers Compensation Act as the last act necessary for the formation of the employment contract was when claimant, while at his home in Kansas, received a telephone call from respondent's employee, Curt Cline, telling claimant he had passed the drug screen and was able to go to work.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 1, 2010, Preliminary Hearing and the exhibits and the May 2, 2011, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent contends the claimant failed to meet his burden of proving that respondent is subject to the provisions of the Kansas Workers Compensation Act (Act). Respondent first argues that no new or additional evidence was presented at the May 2, 2011, preliminary hearing and the evidence used by the ALJ to find that respondent was subject to the provisions of the Act had already been considered and denied by the Board. Therefore, respondent asks that the Board affirm its previous decision. Respondent also asserts that these proceedings are frivolous and asks the Board to award it attorney fees pursuant to K.S.A. 44-536a(d). Respondent next argues that the evidence continues to support the conclusion that claimant's principal place of employment was not in Kansas and that his contract of employment was made on April 6, 2009, in the state of Missouri.

Claimant argues that the additional testimony at the May 2, 2011, hearing, as well as a review of the exhibits, showed that the drug screen was a condition precedent to the employment contract and claimant was offered and accepted the job from respondent by telephone at his home in Kansas on April 10, 2009. Accordingly, claimant asks the Board to affirm the May 11, 2011, Order of the ALJ.

The issues for the Board's review are:

(1) Was claimant's contract of employment with respondent formed in Kansas, as to bring this claim under the jurisdiction of the Kansas Workers Compensation Act?

(2) Is respondent entitled to attorney fees because the proceeding was frivolous?

FINDINGS OF FACT

The issue of whether claimant's contract of employment with respondent was formed in Kansas has been before the Board previously in an appeal from the ALJ's preliminary hearing Order of November 3, 2010, in which the ALJ ordered medical treatment to be provided to claimant by respondent.

In the preliminary hearing held before the ALJ on November 1, 2010, testimony was taken from claimant, Curt Cline and Jeff East. Claimant, who lives in Galena, Kansas, testified that he heard about a job opening at respondent from his brother, Dustin Walton, who worked for respondent as a foreman. Claimant contends his brother brought him an application, he filled out the application at his brother's house in Galena, and then he gave the application back to his brother. Claimant testified the next day, claimant was again at his brother's house in Galena, and his brother told him the job at respondent was being offered to him. Claimant's brother told him his position would be a groundsman and he would be paid groundsman pay. Claimant said he accepted the offer. Claimant said his brother told him he could start the next day and that is what he did. He said after he started working, he was asked to fill out some paperwork, and he took a drug screen a day

or two later. He said he continued to work after the taking drug screen but before the results were known. Claimant believed he was hired in Galena when his brother told him he had the job.

Curt Cline is a general foreman for respondent and was claimant's supervisor. He said he had given claimant's brother, Dustin Walton, Part 1 of an application and told Dustin to have his brother (claimant) call him. Mr. Cline testified that claimant then called him, and they arranged to meet on Monday, April 6. Mr. Cline said claimant's interview took place in Mr. Cline's truck in Joplin, Missouri, on April 6, 2009, and that claimant brought Part 1 of the application with him. Mr. Cline said claimant had completed most of Part 1 of the application but had not dated it. Claimant finished dating the application and Mr. Cline looked it over, looked at claimant's driver's license, and then extended claimant an offer of employment with the condition that the required drug screen came out okay.[1] Mr. Cline said claimant accepted the offer of employment, and he sent claimant to have a drug screen. Claimant went to a clinic in Joplin, Missouri, and gave a specimen for the drug screen on April 6, 2009.

Mr. Cline denied that claimant's brother gave him Part 1 of claimant's application for employment. Mr. Cline said after he had interviewed claimant, he told claimant's brother that claimant could go to work for respondent if everything checked out on him.

After respondent called Mr. Cline and told him claimant had passed the drug screen and it was now okay for claimant to go to work, Mr. Cline called claimant on his cell phone.

> Q. [by respondent's attorney] When you spoke with him on the phone, what did you tell him?
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> A. [by Mr. Cline] I told him that the office had notified me about the results of his drug screen and he was okay to go to work. If he wanted to go to work, be up here Monday, Monday morning.[2]

Jeff East, a project manager for respondent, testified concerning respondent's hiring process. He testified that no one is hired without an interview and that after the interview, if the applicant is offered a job, he must take a pre-employment drug test. Before taking the drug screen, the applicant must fill in Part 2 of the application, which is the Conditional Offer of Employment. This paperwork was made an exhibit to the preliminary hearing, and the paperwork reveals that it was signed in several places by claimant and dated April 6, 2009.

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[1] The ALJ noted in his order that the Conditional Offer of Employment, Respondent's Exhibit B to the preliminary hearing of November 1, 2010, was signed by claimant and dated April 6, 2009, but was not signed by a representative of respondent. ALJ Order for Compensation (May 11, 2011) at 2.

[2] P.H. Trans. (Nov. 1, 2010) at 39.

Mr. East testified that he had no knowledge that claimant or his brother contravened the respondent's hiring policy wherein claimant reported to work before completing the interview process. He said, "That did not happen."[3] Mr. East said that if claimant had shown up to work without any paperwork, he would not have been allowed to start work by the general foreman.

After the November 1, 2010, hearing, the ALJ entered a preliminary hearing order in which he stated: "It is the finding of the Court the contract of employment was made in Kansas."[4] Accordingly, the ALJ found that respondent should provide medical treatment to claimant. Respondent appealed the ALJ's order to the Board. Board Member Shufelt held:

> The claimant's interview, completion of the paperwork, drug screen and finally showing up for work all were performed and completed in Missouri. Accordingly, the last acts necessary to form or complete the contract occurred in Missouri. This Board Member finds that the determination by the ALJ that the Act applies to this fact situation is reversed and claimant's request for benefits denied.[5]

After the entering of Board Member Shufelt's decision on January 31, 2011, claimant filed applications for preliminary hearing on February 25, 2011, and April 20, 2011. A preliminary hearing was held on May 2, 2011. At that time, the ALJ announced:

> This was a re-hearing of a prior preliminary hearing held back in November of 2010. And after consulting with counsels, my impression with re [*sic*] the position of the respondent is the same–remains the same in both cases.[6]

There were no exhibits attached to the transcript of the May 2, 2011, preliminary hearing that had not already been made a part of the record on November 1, 2010. Claimant did not testify at the May 2, 2011, hearing. The only witnesses to testify were Mr. Cline and Mr. East.

Mr. Cline testified on May 2, 2011, that before he met with claimant, he told Mr. East that Dustin Walton's brother (claimant) wanted to go to work. Mr. East told him to have claimant fill out an application and check it out. Mr. Cline met with claimant on April 6, 2009, in Joplin, Missouri. After the interview, Mr. Cline made an offer of employment to claimant, conditional on the passing of the drug screen. At that time, claimant filled out

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[3] P.H. Trans. (Nov. 1, 2010) at 27.

[4] ALJ Order for Medical Treatment (November 3, 2010) at 2.

[5] *Walton v. Wright Tree Service*, Docket Nos. 1,052,428 & 1,052,429, 2011 WL 494980 (Kan. WCAB Jan. 31, 2011).

[6] P.H. Trans. (May 2, 2011), at 3.

other paperwork, including a W-2. After claimant had completed the interview and application process, Mr. Cline told Mr. East that he had sent claimant for a drug test. When Mr. Cline received information from the office in Des Moines that claimant had passed the drug screen, he let Mr. East know. Mr. East told him to call claimant and tell him to come in to work on April 13. Mr. Cline testified that when he called claimant, he simply told him that the drug screen had cleared and he could come to work. Although at one point Mr. Cline said he called claimant at home, he clarified later that he called claimant on his cell phone and did not know where claimant was when he called.

Mr. Cline said that prior to meeting with claimant on April 6, he spoke with claimant's brother and he thinks one other person about claimant. He did not check with any references listed on claimant's application. Therefore after the interview and paperwork, he said the only hurdle left for claimant before starting to work would have been the drug screen. He acknowledged that if claimant had not passed the drug screen, respondent could not have allowed him to work.

Claimant's attorney directed Mr. Cline's attention to the Conditional Job Offer & Medical Review form, which had been made an exhibit at both preliminary hearings.[7] The form has a blank on the first page for "Date of Job Offer."[8] Mr. Cline had not filled out that blank. Mr. Cline had not signed the form on the back, even though the form sets out: "This offer is valid only if the back of this page is signed by a company representative."[9] Nor had Mr. Cline given claimant a copy of the Conditional Job Offer.

On May 2, 2011, Mr. East testified he gave Mr. Cline approval to interview claimant and if he felt okay, to hire him. After Mr. Cline interviewed claimant, he called Mr. East and said he felt that claimant was a good candidate for the position, that he had offered claimant the job, and that he had sent him for a drug screen. That conversation was held on April 6, 2009.

PRINCIPLES OF LAW

The Workers Compensation Act applies to work-related accidents sustained outside the state when the employment contract is made within the State of Kansas, unless the contract otherwise specifically provides.

> . . . That the workmen's compensation act shall apply also to injuries sustained outside the state where: (1) The principal place of employment is within the state;

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[7] The copy introduced on May 2, 2011, is missing some pages.

[8] P.T. Trans. (Nov. 1, 2010) Respondent Ex. B at 2.

[9] *Id.*

> or (2) the contract of employment was made within the state, unless such contract otherwise specifically provides: . . . [10]

In the case of *Chapman,*[11] the Supreme Court of Kansas reaffirmed the state's policy of liberally construing the Kansas Workers Compensation Act for the purpose of bringing employers and employees within its provisions and to provide the protections of the Act to both, citing K.S.A. 44-501(g).

In *Shehane*,[12] the Kansas Court of Appeals held:

> The basic principle is that a contract is "made" when and where the last act necessary for its formation is done. *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975). When that act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance. *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, Syl. ¶ 1, 512 P.2d 438 (1973) . . .

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

ANALYSIS

Claimant's accidents and injuries occurred outside the state of Kansas. Therefore, jurisdiction of claimant's workers compensation claim lies in Kansas only if claimant proves that his principal place of employment is in Kansas, his contract of employment was made in Kansas or his employment contract provides for Kansas jurisdiction.[15] Neither party contends that the employment contract provided for a specific state jurisdiction or that the

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[10] K.S.A. 44-506.

[11] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 655, 907 P.2d 828 (1995).

[12] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

[13] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2010 Supp. 44-555c(k).

[15] K.S.A. 44-506.

principal place of employment was in Kansas.[16] The sole issue then is where the employment contract was made; specifically, in what state was the last act necessary for the formation of the employment contract done.[17]

The ALJ determined and the parties seem to now agree that respondent made claimant a conditional offer of employment at the face to face meeting between claimant and Mr. Cline on April 6, 2009.[18] This meeting took place in Missouri. This offer was conditioned on claimant taking and passing a drug screen. Claimant accepted the offer. Whether that acceptance constituted a contract or the last act necessary to form the employment contract turns on whether passing the drug screen was a condition precedent or a condition subsequent. The ALJ held that the drug screen was a condition precedent and that the contract was formed when a representative of respondent telephoned claimant to inform him that he passed the test and could report to work. Respondent contends that the drug screen was a condition subsequent and the contract was formed at the meeting on April 6, 2009, in Missouri. This Board Member concludes that the drug screen was a condition subsequent, just as the Kansas Court of Appeals determined in *Shehane*. Furthermore, even if taking and passing the drug screen was a condition precedent, then that act likewise occurred in Missouri, where claimant gave the sample to be tested. Respondent's subsequent telephone call to advise claimant he had passed the test and when to report to work was a ministerial act not material to the formation of the contract; claimant had already given the test sample and passed the test before that telephone call. Taking claimant's argument to the next logical step, that claimant must be informed of the test results before there was a contract, then claimant would have had to have also shown up for work at the appointed time and place before there was a contract. That place was also in Missouri. Likewise, if the written conditional offer of employment signed by claimant on April 6, 2009, had no effect because it was not signed by a representative of respondent, then there was no contract until it was signed by respondent (which presumably was done in Missouri) or until claimant showed up to work, which was in Missouri.

Respondent argues the second preliminary hearing before the ALJ and this appeal were frivolous because the Board had already decided the issue. Respondent asks for attorney fees. This Board Member disagrees. First, additional evidence was presented at the May 2, 2011, preliminary hearing. Moreover, the Board Member's Order of November 3, 2010, was not a final order and it was not an order issued by the full Board. Preliminary hearing orders are subject to change after either a subsequent preliminary hearing or upon a full hearing of the claim. And as the conflicting rulings between the ALJ and certain Board

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[16] "Claimant and Respondent agree that compensability of this claim hinges on when the last act necessary to form an employment contract was made." Claimant's Brief to Board, filed June 10, 2011, at 1.

[17] *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 261, 3 P.3d 551 (2000).

[18] The ALJ determined that the conditional offer of employment had no effect until it was signed by the company representative. ALJ Order (May 11, 2011) at 2.

Members attest, this case presents questions of fact and law upon which reasonable minds can disagree. Respondent's request for attorney fees is denied.

CONCLUSION

(1) Claimant's contract of employment with respondent was made in Missouri. Kansas is without jurisdiction to order benefits for claimant's injuries.

(2) Respondent is not entitled to an award of attorney fees.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Brad E. Avery dated May 11, 2011, is reversed.

IT IS SO ORDERED.

Dated this _____ day of July, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brandon A. Lawson, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge